No. 3513

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

American Merchant Marine Insurance Company of New York (a corporation),
Appellant,

vs.

H. G. Tremaine, S. L. Buckley and John Doe Buckley, doing business under the firm name and style of Buckley-Tremaine Lumber Company,
Appellees.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

Pursuant to leave of court first had and obtained, the following reply to the brief of appellee herein is submitted on behalf of appellant.

I. FAILURE TO ALLEGE COMPLIANCE WITH THE WASHINGTON STATUTE IS THE SOLE GROUND ASSIGNED IN THE OPINION OF THE COURT BELOW FOR DISMISSING THE COMPLAINT, AND, IF THAT STATUTE IS NOT APPLICABLE TO THE CASE, THE DECREE SHOULD BE REVERSED WITH LEAVE TO PLAINTIFF TO AMEND ITS COMPLAINT SO AS TO MEET ANY VALID OBJECTION NOW RAISED BY DEFENDANT.

As was stated in plaintiff's opening brief, the sole question at issue in this case is the construction

and application of the Washington statute, for that was the only question passed upon by the District Court.

In his brief in this court defendant has, however, devoted more than half his space to pointing out other alleged defects in the complaint. Because of these defects he urges that, regardless of the statute, the complaint is still insufficient and therefore the decree must be affirmed.

This argument proceeds upon the tacit admission that the statute has no application to the case, and it will be met upon that basis. But even if it be assumed for the sake of argument that the complaint is defective in other respects, it does not follow that the decree should be affirmed, especially in view of the fact that all of the alleged defects can be cured by amendment.

Rule 19 of the Equity Rules of the Supreme Court provides for the allowance of amendments at any time, and requires the court, at every stage of the proceedings, to disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Equity Rule 19.

It would have been useless, after the court below based its decision on the statute, to amend the complaint, for no amendment which plaintiff could have framed would have obviated the effect of the decision. Furthermore, plaintiff was, in the light of an opinion based solely upon the statute, justi-

fied in assuming that its complaint was sufficient in all other respects.

There were then only two courses open to plaintiff, either to abandon its suit or to appeal from the decree. If, therefore, on the appeal this court is of opinion that the statute has no application to the case, the complaint should not be dismissed because of any other defect therein which can be cured by amendment. On the contrary, the decree should be reversed and leave given plaintiff to file such amended complaint as will conform to the views of this court.

Had the court below held that the statute was inapplicable, but nevertheless dismissed the complaint because of other defects curable by amendment, plaintiff would undoubtedly have been permitted to amend. The fact that plaintiff was forced to take an appeal before it could be determined that the statute was inapplicable, should not deprive plaintiff of the privilege of amendment which could have been exercised had no appeal been necessary.

Should this court hold that the statute has nothing to do with the case and yet affirm the decree because of other amendable defects in the complaint, plaintiff will have been penalized for failing to amend at a time when nothing could have been accomplished by amendment, and will have been robbed of the fruits of a necessary and successful appeal.

II. DISREGARDING THE WASHINGTON STATUTE, DEFENDANT'S OTHER CRITICISMS OF THE COMPLAINT ARE NOT WELL FOUNDED, AND, EVEN IF JUSTIFIED, ALL OF THEM CAN BE OBVIATED BY AMENDING THE PLEADING.

Independently of the statute, defendant asserts that the complaint is insufficient in several particulars which will be discussed in the order of their enumeration in defendant's brief. Again, however, we desire to emphasize the fact that the only real question in this case is the statute. If the District Court is correct and the decree is affirmed because of the statute, this suit is ended. But if this court is of opinion that the statute has nothing to do with the case, we do not think a meritorious suit should be brought to an abrupt conclusion solely because of technical and amendable defects in pleading. Hence we hesitate to burden the court with a lengthy discussion involving nothing but hair splitting distinctions over technical niceties of pleading. There is a real controversy concerning the merits of this case. If the complaint in its present form is certain enough so that the defendant is distinctly informed of the nature of the case which he is called upon to meet, it is sufficient. On the other hand, any allegations necessary to obviate the exceedingly technical objections now raised by defendant can be supplied by amendment. In any event, plaintiff should be permitted to try its case upon this or some amended pleading.

We submit that the present complaint is sufficient. It sets forth with precision the contract that was

made as expressed in the certificate (Exhibit "B", Tr. 25). With equal precision it sets up the contract both parties intended to make (Exhibit "C", Tr. 28). It alleges wherein the contract made differs from the one intended, and that the intention of both parties was frustrated by mistake or fraud. Under all the authorities these allegations constitute a sufficient and complete statement of a cause of suit.

Cases cited Opening Brief, pages 12, 13.

Defendant urges that the complaint is insufficient for the following reasons:

1. **The complaint fails to show that plaintiff has been or will be injured, or the need or reason for equitable relief.**

This objection seems to us little short of puerile and we hesitate to dignify it by any extended discussion. Here is a case which has been so hard fought that it is in the Circuit Court of Appeals even before issue joined on a mere question of pleading. Yet defendant endeavors with medieval scholasticism to convince this court that the complaint presents nothing but a "purely speculative and abstract proposition". The learned Senior Judge of this circuit during oral argument remarked, "I assume a loss has occurred". We do not suggest there is any such presumption of law nor do we seek to construe the remark as committing the court in advance of decision. But the observation is an apt commentary upon defendant's con-

tention that the parties and their counsel have engaged in this litigation as an intellectual diversion.

Of course a loss has occurred, and the fact can be alleged by amendment. But the point we are making is that no amendment is necessary.

If, after having largely abandoned the statute as his real position, the defendant seeks to rest his case on other alleged technical deficiencies in the complaint, we can match technicality with technicality.

The certificate as it stands amounts to an open policy, apparently covering the voyage whenever it may be made. Under it, for all that appears, defendant may dispatch the scow at any time, next week or next month, and, if a loss occurred, hold the plaintiff to a contract of indemnity, which the complaint alleges was never intended by the parties.

Surely such a situation, apparent on the face of the complaint, constitutes sufficient showing that plaintiff "has been or will be injured" and conclusively demonstrates the "need or reason for equitable relief".

To meet this case defendant falls back on presumption. First he denies to plaintiff the benefit of any negative presumption that the scow did not sail in time, and then claims for himself an affirmative presumption not only that the scow has already sailed, but that she sailed in October, 1919. As a matter of law there is no presumption either way.

Furthermore, even though no presumption may be entertained in behalf of a pleading, certainly none will be to defeat it.

However, if the injury to plaintiff and the need for equitable relief do not sufficiently appear upon the face of the complaint, it can be amended to show that the scow did not sail until the second week in November, 1919; that thereafter a claim was made for a total loss of its cargo; that shortly after the decree of the District Court was entered, defendant and his two partners brought suit in admiralty in the same District Court upon the very certificate plaintiff is seeking to reform; and that the admiralty suit has been stayed pending the determination of this suit.

2. The complaint does not sufficiently show whether the omitted phrase was intended by the parties to be a warranty, or a representation, and, if the latter, that it was material.

Whether the omitted phrase constitutes a warranty or a representation is a question of construction, which can only arise when some court is called upon to determine the meaning and legal effect of a contract in which the phrase appears. The certificate as it stands contains no such phrase. Because it doesn't, this suit was filed. The problem presented by this suit is merely to determine whether or not the omitted phrase, whatever its meaning and effect, should be inserted in the certificate. This problem involves no question of construction and none can arise until this case is determined.

Without pressing the argument further, suffice it to say that if the court thinks defendant's point is well taken, the objection is easily met by amendment.

3. The complaint does not contain a sufficient allegation as to the existence of a mutual mistake.

This criticism seems to be based upon the fact that the complaint is a bill with a double aspect. Paragraph VII (Tr. 22) charges mutual mistake and, in the alternative, unilateral mistake, coupled with fraud by defendant. It is elementary that reformation will be allowed in either case. Under such circumstances a bill with a double aspect has the sanction of authority and is the approved practice of a careful pleader.

Brown v. New York Life Ins. Co., 68 Fed. 785.

The test of mutual mistake is not found in the mere allegation that the mistake was mutual, but rather in the question, "Is the contract the one both parties meant to make?" Judged by this criterion, it is submitted, that the complaint clearly shows that the parties did not intend to make any such contract as is expressed in the certificate in its present form.

But again, the objection involves nothing that cannot be met by amendment, should the court be impressed with defendant's point.

4. The complaint shows laches in bringing suit and that defendant has been prejudiced thereby.

In view of the discussion of this subject which took place during oral argument between the writer and the learned Senior Judge, we feel justified in giving the question more than passing consideration.

The gist of laches, estoppel and analogous matters is not mere lapse of time, but resulting prejudice. Laches has nothing to do with the Statute of Limitations which involves merely the passage of time, but is founded on the principle that equity will not grant relief when the defendant has justifiably altered his position in complete ignorance of the facts upon which relief is sought. In every instance the question of laches must be determined upon the facts and circumstances of the particular case, and no general rule can be laid down.

In this case defendant claims he has been prejudiced by delay; that he has changed his position in reliance upon a condition which plaintiff now seeks to alter. Obviously the only prejudicial change of position which he can claim must rest upon an admission or statement that he dispatched the scow later than October, 1919, in reliance upon a certificate which contained no limitation on the sailing date.

We are, however, testing the sufficiency of a complaint and not determining the validity of a defence. Hence every single element of laches must

be found in the complaint. All that appears is the mere lapse of time which in itself does not constitute laches. The resulting prejudice flows only from a late sailing, a fact not apparent on the face of the complaint. This indispensable element of laches is entirely lacking and is supplied only by defendant's argument. So technically laches does not appear on the face of the bill, and, if it exists at all, must be raised by answer.

Another element of laches is ignorance of the facts upon which relief is predicated and justifiable reliance upon a condition which is for the first time controverted by the complaint. This element of laches is completely negatived by the complaint.

Paragraph VII (Tr. 22) contains alternative allegations of mutual mistake, or unilateral mistake coupled with fraud, which have already been mentioned in another connection.

The allegation of mutual mistake charges in substance that defendant accepted the certificate believing that it required an October sailing. This allegation is admitted by the motion. If such was defendant's belief, he could not have permitted the scow to sail later than October without a conscious knowledge that he was deliberately disregarding what he believed to be the requirements of his contract. There is no reliance upon the certificate for its supposed terms have been ignored. In order to supply the missing element of laches (reliance on the certificate) defendant must deny the allegation

that he believed the certificate required an October sailing. This he can do by answer, and, it may be, he can establish laches as a defence. But inasmuch as he has not done so, but, on the contrary, has by his motion admitted a specific allegation which shatters the entire theory of laches, he has demonstrated by his own argument that laches does not appear on the face of the bill.

The other alternative allegation is that defendant knew all the time that the certificate did not contain the October sailing clause; that plaintiff thought it did, and that it was omitted by accident and mistake. These allegations are likewise admitted as an alternative by the motion, as well as the further significant fact that defendant failed to disclose the omission to plaintiff.

If, then, defendant dispatched his scow later than October, he did so with the conscious and deliberate intent of entrapping plaintiff into a liability which was never contemplated by either party to the contract. This is not laches on the part of plaintiff, but unconscionable fraud on the part of defendant. Here again, laches may be a real defence, but it must be established by a denial and not by an admission of the allegations under attack.

The complaint does not say that both the alternative allegations are true, but only that one or the other was the fact. An admission of either is a complete refutation of defendant's entire argument. His

point is merely a premature attempt to present his case on the merits.

Providence Steam Engine Co. v. Hathaway Mfg. Co., 79 Fed. 512, at 516, 517.

Furthermore, the courts of this circuit are reluctant to dismiss a bill for laches unless it clearly and unmistakably appears in the complaint, and prefer to reserve the question until final hearing on the merits.

Durham v. Fire & Marine Ins. Co., 22 Fed. 468, at 469 (U. S. C. C. D. Oregon).

Defendant also urges that plaintiff's delay operates as a waiver of any provision of the cover note which is inconsistent with or was omitted from the certificate. But his cases all lay down the rule that the presumption of waiver governs only in the absence of fraud, misrepresentation and mistake. Obviously the presumption is inapplicable to a suit for reformation, the gist of which must be either fraud or mistake.

In the same connection defendant calls attention to the case of *Andrews v. Essex Co.* (1 F. C. 374), in which it was said that "it is not pretended that everything contained in the memorandum was to be inserted in the policy." The application of the quoted language is not apparent, for it is alleged in paragraph IV of the complaint (Tr. 20) that the entire transaction was governed by a custom and usage, one of the essential elements of which was that *all the terms, conditions and warranties of the*

cover note were to be inserted in the certificate. This was the alleged intention of both parties and is admitted by the motion.

However, if the court should be of opinion that, unless explained, the delay in bringing suit constitutes laches, the objection can be easily overcome by amendment. Such amendment, if required, will show that immediately after the delivery of the certificate, plaintiff in the usual course of business filed all the papers away and had no occasion to refer to them until November 25, 1919, when defendants made a claim for total loss under the certificate; that up to that time plaintiff believed the certificate contained the October sailing clause and assumed that the risk had been run off in accordance with the real contract of the parties; that the omission of this clause from the certificate was not discovered until claim for loss was made, at which time plaintiff informally denied liability on the certificate because the scow did not sail in October; that formal claim was made on December 19 or 20, 1919, and formally denied March 8, 1920; and that this suit was filed on March 24, 1920.

III. THE WASHINGTON STATUTE.

It was contended in plaintiff's opening brief that the statute has no application to suits in equity for reformation because, (1) it is a statutory extension of the parol evidence rule and neither the rule nor its extension can be applied in such suits without

abolishing the doctrine of reformation itself; because (2) it is a rule of construction and hence inapplicable to suits of this character in which no question of construction is involved; because (3) it has no application to contracts of marine insurance for the reason that the general maritime law cannot be changed by state legislation; and because, (4) regardless of any other consideration, it cannot be applied in a reformation suit on the equity side of the Federal courts without in effect impairing their jurisdiction.

In reply to these contentions defendant urges the following points which will be discussed in the order of their enumeration in his brief:

1. Plaintiff does not come into court with clean hands because it did not comply with the statute.

This argument assumes that the statute commands plaintiff in every instance to deliver a copy of the application with every policy issued by it. But the most superficial examination of the statute negatives any such idea. The statute merely lays down a rule for determining the construction of an insurance policy in any proceeding in which its construction is properly involved. Rules of construction are addressed to courts, not to parties. The only way in which a rule of construction can be "violated" is by disregarding it, and the only person who can be deemed to have violated it is a judge who ignores it in construing an insurance policy properly before him.

Moreover, even if the statute were addressed to plaintiff, it does not follow that plaintiff was bound to obey it. When plaintiff qualified as a foreign corporation to do business in Washington it did not agree to obey all the laws of Washington, but only those which were constitutional and applicable under proper construction. For example, it did not agree to obey any law which forbade it to remove cases into the Federal Court. Such a statute is a nullity because unconstitutional. If, therefore, the instant statute is void when construed and applied as it was by the District Court, plaintiff's failure to deliver a copy of the cover note with the certificate does not furnish any support for defendant's assertion that plaintiff does not come into court with clean hands.

As to the suggestion that plaintiff waived its right to question an unconstitutional statute by accepting the privilege of doing business in Washington, we can only urge that such a motion does the utmost violence to fundamental principles and is entirely unsupported by authority or reason.

2. The statute does not prescribe any rule of evidence nor is it an extension of the parol evidence rule.

In discussing this point defendant relies upon the fact that the statute says nothing about proof or evidence. In other words, it does not bear the label we put on it in the opening brief.

Without any desire to be flippant, the language of a noted raconteur furnishes an apposite answer to

defendant's criticism of the label. Any liquid which looks like gin, tastes like gin, acts like gin, and, upon analysis is found to possess the chemical constituents of gin, is gin, regardless of any label on the bottle.

In the opening brief we made a somewhat painstaking analysis of the statute, and endeavored to show that it operated not only as a rule of evidence, but as a complete abolition of the entire doctrine of reformation when applied in suits of that character. It is submitted that the analysis is ample warrant for labelling the statute a rule of evidence.

Defendant offers no criticism of the analysis nor does he question the reasoning upon which our conclusions are based. He contents himself with the remark that our characterization of the statute as a rule of evidence is "extraordinary", and rests his argument upon the bald assertion, unsupported either by principle or authority, that the statute was properly applied by the District Court.

Plaintiff's contention that the decree of the District Court amounts to acquiescence in the destruction of its equitable jurisdiction by state legislation, is left absolutely unanswered.

There is no case in the books which holds that the statute has any application to a reformation suit. Up to the present time no one but defendant has thought that state legislatures have by passing this and similar statutes intended to destroy the doctrine of reformation, and no one has had the temer-

ity to assert that such legislation could constitutionally accomplish such a result in the Federal equity courts.

3. The statute is not unconstitutional, and its application to a suit in equity for reformation does not disturb the uniformity of admiralty jurisdiction.

The argument proceeds upon a complete misconception of plaintiff's opening brief, and clearly demonstrates that defendant has confused the distinction between the general maritime law and admiralty procedure and practice.

The constitution, as interpreted by the Supreme Court in the *Jensen* case (244 U. S. 205; 61 L. Ed. 1086), not only prohibits the states from disturbing the uniformity of admiralty jurisdiction, procedure and practice, but also precludes them from changing the general maritime law. That is, both adjective and substantive maritime law are withdrawn from the scope of legitimate state legislation.

Defendant urges that the *Erickson* case (248 U. S. 308; 63 L. Ed. 261) merely decided that the California Statute of Frauds could not govern the making of a maritime contract when sued upon in admiralty in the Federal court. He then draws the conclusion that as this case is in equity, the application of the Washington statute herein cannot be regarded as tending to disturb the uniformity of admiralty jurisdiction or practice and procedure.

This conclusion is an example of the familiar practice of knocking down a man of straw. The only reason for citing the *Erickson* case in the opening brief was to show that the formation of a maritime contract is governed by the general maritime law, and not by the local statute. Then we cited the *Chelentis* case (247 U. S. 372; 62 L. Ed. 1171) to establish that the maritime law must be applied to maritime transactions in every court, whether of admiralty, common law or equity. We next set forth the general maritime law governing the making of contracts of marine insurance. This is the law which, under the doctrine of the *Erickson* and *Chelentis* cases, must be applied even in a court of equity. And lastly we cited the *Jensen* case (supra) to show that the general maritime law cannot be changed by state legislation.

Our conclusion was that the instant statute was never intended by the Washington legislature to apply to contracts of marine insurance, because the legislature must have known the limitations upon its power and cannot be presumed to have adopted an unconstitutional act. Hence, as the statute does change the general maritime law if applied to contracts of marine insurance, we urged that the decision of the District Court not only imputed an unconstitutional intent to the legislature, but amounted to a declaration that such an intent can be given effect.

It has never been suggested that the application of the statute in this equity case will destroy the

uniformity of admiralty jurisdiction, procedure or practice in the Federal courts. Moreover, we stated expressly in the opening brief (page 32) that the *Erickson* case (supra) could not be distinguished nor its authority diminished because it arose in the admiralty court; for, as the *Chelentis* case shows, the general maritime law governs in every court regardless of its character and jurisdiction. The *Erickson* case (supra) was but a link in the chain of argument, and, while it can be differentiated from this case, none of the distinctions drawn by defendant undermine the argument in the slightest degree.

Our whole contention upon this branch of the case was and is that the Washington statute should not be construed as applicable to contracts of marine insurance, and, if no other construction is possible, the statute is unconstitutional. The authority for this assertion is the *Jensen* case (supra), holding that the general maritime law cannot be changed by state statute. Although defendant devoted four pages of his brief to an analysis of the *Erickson* case, he failed even to mention the *Jensen* case or the *Chelentis* case. He has made no answer to the main contention and the argument of the opening brief remains unimpaired.

The only attempt to answer the argument involves an effort to show that the cover note is not a maritime contract, but merely a preliminary agreement which will result in the conclusion of such

a contract when the certificate is issued. It is true that there is a dictum to that effect in the early case of *Andrews v. Essex Co.* (1 F. C. 374), but this dictum has long since been overruled by more recent cases. *Kerr v. Union Marine Ins. Co.* (124 Fed. 835) is a clear-cut decision that a cover note is a maritime contract, and the decision is not contradicted by any later case. The cases cited by defendant in his brief (page 21) did not involve suits on cover notes, and hence are not in point.

Defendant also attempts to draw an analogy between a cover note and a contract to build a ship, and because, as he says, both are non-maritime, state legislation with regard to either is valid. The analogy fails because the premise is false. A cover note is a maritime contract as we have just seen, whereas a contract to build a ship is not.

However, plaintiff's argument does not rest upon the fact that the cover note is a maritime contract, for, irrespective of the cover note, there can be no doubt that a policy or certificate of marine insurance is of maritime character. The fact that the cover note is also a maritime contract is but additional evidence that the whole transaction is maritime in its nature, and hence beyond the legitimate scope of state legislation.

IV. PLAINTIFF'S FAILURE TO BRING ALL THE ESSENTIAL PARTIES BEFORE THE COURT RENDERS IMPOSSIBLE THE GRANTING OF ANY RELIEF.

There are three partners named as defendants in the complaint. The defendant H. G. Tremaine is a citizen of Washington and appellee herein. The other two partners are Canadians, non-resident aliens. They had not been served nor had they made any personal appearance when the decree of the District Court was made.

It is admitted that no final decree awarding relief to plaintiff can be made until all three partners are before the court. But the decree in this case does not involve the merits, it was not made after final hearing, and it cannot be final unless, of course, the statute is thought to end the litigation.

The rule that all indispensable parties must be before the court means only that no relief can be granted by final decree which will bind them in their absence. This rule is clearly enunciated in the only two cases cited by defendant in support of his contention that the bill must be dismissed at this time because of the absence of indispensable parties.

In *Mallow v. Hinde* (12 Wheat. 193; 6 L. Ed. 599) the cause had been set down for final hearing on the merits on bill and answer. The absence of indispensable parties at this stage of the suit inevitably resulted in the dismissal of the bill, but without prejudice.

In *Barney v. Baltimore* (6 Wall. 290; 18 L. Ed. 825) the situation was slightly different. Jurisdiction depended solely on diversity of citizenship. Certain indispensable parties were residents of the District of Columbia, and as such not citizens of any state. Inasmuch as there is no jurisdiction based solely on diversity of citizenship when any indispensable party is a resident of the District of Columbia, the bill was necessarily dismissed, and of course without prejudice. But the dismissal was based not on the absence of indispensable parties at a preliminary stage of the proceedings, but because of the fundamental lack of jurisdiction which could not have been cured even if they had been served or had personally appeared.

The case at bar is not for final hearing on the merits and hence is distinguishable from *Mallow v. Hinde* (supra). It is also distinguishable from *Barney v. Baltimore* (supra) because in that case there was a fundamental lack of jurisdiction which neither service nor appearance could cure, whereas in this case the jurisdiction will be complete as soon as the other two defendants are personally served or voluntarily appear.

The phraseology of defendant's objection closely follows the rule laid down in his cases, but the wording itself shows that his position is untenable and that the rule does not apply at this stage of the proceedings. He says the absence of his partners "renders impossible the granting of any relief." But we have not yet progressed to the

point where any relief is sought or can be granted. If defendant's motion in the court below had been denied, no relief would have been granted to plaintiff. The defendant would merely have been required to answer. Again, no decree that his court can make on this appeal will result in granting plaintiff the relief prayed for. This case is not on final hearing and the decree cannot settle the merits.

The motion to dismiss based on the Washington statute constituted an attack which, unless successfully parried, meant an immediate end of the whole case. But as the merits are not and cannot be involved, the absence of the other two partners at this stage of the proceedings is wholly immaterial.

If the decree is reversed, it will be time enough to bring the non-resident partners into court. Defendant's discussion implies that this will prove an impossible task. His position as the close business associate of the two Canadians doubtless leads him to believe that they either intend, or can be induced by him, to evade service successfully. Suffice it to say that we are prepared to meet this issue when it arises. Notwithstanding defendant's confident belief to the contrary, when this case comes on for final hearing the decree will not fail for lack of indispensable parties. Jurisdiction of the Canadians will be obtained speedily if the decree is reversed by this court.

In any event, in view of the fact that this is not a final decree on the merits, the objection based on

failure to serve the Canadian partners, does not require that the decree be affirmed and the complaint dismissed.

V. THE MATTER OF CHANGE OF VOYAGE COVERED BY ADJUSTMENT OF PREMIUM.

The certificate contains the following provision:

> "Held covered at a premium to be arranged, in case of deviation or change of voyage or of any error or unintentional omission in the description of the interest, vessel or voyage, provided same be communicated to the insurer as soon as known to the assured."

Defendant wants to know why this provision could not be applied to the case and why something wasn't said about it in the complaint.

The most obvious answer is that the clause is dependent upon notice from defendant to plaintiff. If notice was given, let the defendant allege it. It is purely matter of defence and no concern of the plaintiff nor part of its case.

This point is but another illustration of defendant's constant effort to try his case on the merits in this court by complaining of plaintiff's failure to allege defensive matter in the complaint.

VI. COSTS.

If the court be of opinion that the Washington statute is inapplicable, plaintiff will have prevailed in this appeal, even though the complaint may contain other defects which may require amend-

ment. The statute is the gist of the case and the decision of the District Court blocked the further prosecution of the cause unless an appeal was taken. If then the statute is inapplicable, plaintiff is entitled to proceed either upon this or an amended complaint. We have endeavored to show that this complaint is sufficient and such is our confident belief, but even though the court be of a contrary opinion, plaintiff should be permitted to amend. In any event, if the court decides that the statute is inapplicable, plaintiff must be deemed to have prevailed in its appeal, and should be allowed costs in both courts.

In conclusion we submit that the decree of the District Court should be reversed and the cause remanded for further proceedings; that the District Court should be directed to deny defendant's motion to dismiss and require him to answer the first amended complaint herein; or, in the event this court is of opinion that the complaint contains amendable defects, that the District Court be directed to sustain the motion with leave to plaintiff to amend the complaint. Plaintiff should be allowed the costs of both courts.

Dated, San Francisco,
October 20, 1920.

Respectfully submitted,

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